

Kupetz v. Burt, Vetterlein and Bushnell Adv. No. 92-3112-S

(In re Stein) Case No. 392-33885-S7

Judge Jones

6/17/92

The district court denied a defendant's motion to withdraw reference partially because the bankruptcy court had not yet determined whether the defendant was entitled to a jury trial. The mere existence of noncore matters is not good cause to withdraw reference of an adversary proceeding.

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CLERK, U.S. DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND, OREGON

U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
FILED

recd JUN 22 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERENCE H. DUNN, CLERK

BY \_\_\_\_\_ DEPUTY.

In re: ALEXANDER V. STEIN, )  
 )  
Debtor, )  
 )  
\_\_\_\_\_)  
 )  
ARNOLD L. KUPETZ, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BURT, VETTERLEIN & BUSHNELL, )  
P.C., an Oregon Professional )  
Corporation, )  
 )  
Defendant and )  
Counterclaim Plaintiff.)

Case No. 392-33885-S7

Adv. Proc. No. 92-3112-S

OPINION AND ORDER

JONES, Judge:

This matter comes from the bankruptcy court. The parties are aligned as follows: Alexander Stein is the debtor ("debtor"). Arnold Kupetz is the trustee ("trustee"), who filed this adversary proceeding against Burt Vetterlein & Bushnell P.C. ("BVB"), alleging claims for avoidance of a fraudulent transfer, fraud, conversion, breach of contract, unjust enrichment, for the set aside of a sheriff's sale, and for recovery of an avoided transfer and turnover of property.

In turn, BVB asserted a third party complaint against Mark Gordon ("Gordon"), George Stein ("Stein"), Premium Technology, Inc. ("Premium Technology"), Premium Entertainment Network, Inc. ("Premium Entertainment"), Premium TV International, Inc. ("Premium TV"), and the debtor. The claims asserted against Gordon are essentially for contribution and indemnity; contribution for fraudulent transfer, unjust enrichment, fraud, conversion, shareholder liability under O.R.S. 58.185, and indemnity for misrepresentation. The third party complaint against Gordon also includes claims for breach of fiduciary duty owed to BVB, fraud, securities misrepresentation, fraudulent conveyance, and racketeering.

BVB and Gordon filed motions to withdraw reference, contending this adversary proceeding belongs in the district court.<sup>1</sup>

Title 28 U.S.C. § 157(d) provides that

[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organization of activities affecting interstate commerce.

By its plain language, 28 U.S.C. § 157(d) allows for permissive and mandatory withdrawal of reference. BVB and Gordon do not

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<sup>1</sup> Gordon's motion is first a motion to dismiss, second a motion to abstain, and third a motion to withdraw reference. This court shall only address the motion to the extent it requests to withdraw reference.

contend that this matter requires mandatory withdrawal of reference, but that the requirements for permissive withdrawal of reference have been satisfied.

#### Parties' Contentions

BVB and Gordon have not and will not consent to the bankruptcy's court jurisdiction to determine noncore issues or to preside over a jury. BVB admits that some of the claims, however purportedly an insignificant number by comparison, can be heard and determined by the bankruptcy court as they require interpretation of bankruptcy law. BVB also cites to judicial economy for support for its motion.

The trustee opposes the motions to withdraw reference. The trustee concedes that both core and noncore claims are at issue, but the claim that goes to the heart of the dispute, fraudulent transfer, is a core claim. The trustee contends that the noncore claims are related to the core claim because all the claims stem from and arise out of the same set of facts as the fraudulent transfer claim. Because this adversary proceeding is predominantly a core proceeding and because the bankruptcy court has special expertise, the trustee offers that this court should not withdraw reference.

Additionally, proffers the trustee, BVB waived its right to a jury trial; BVB submitted itself to the jurisdiction of the bankruptcy court by filing counterclaims and third party claims in the adversary proceeding.

BVB partially opposes Gordon's motion for withdrawal of reference. BVB opposes Gordon's motion to the extent Gordon asks, in the alternative to complete withdrawal of reference, the court to withdraw that portion of the adversary proceeding that relates to BVB's third party claims. BVB initially reiterates that it seeks to have the entire adversary proceeding withdrawn. Withdrawing only a part of the adversary proceeding will allegedly result in a "proliferation of litigation . . . resulting in at least three separate, virtually identical, trials in three different forums, raising the specter of inconsistent results, significant waste of judicial resources, and incurrence of tremendous legal fees and costs by the parties."

#### Discussion

The Supreme Court recently held that Congress' designation of a claim as "core" under the bankruptcy code does not automatically vitiate the Seventh Amendment right to a jury trial. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989). Rather, the determination of the right to a jury trial turns upon whether the right is legal in nature. Id. The Supreme Court expressly did not address whether a non-Article III tribunal, the bankruptcy court, has the power to preside over the jury trial if the jury entitlement is present. Cf. In re Cinematronics, Inc., 916 F.2d 1444 (9th Cir. 1990) (bankruptcy court cannot conduct jury trials on noncore matters where the parties have not consented).

In the present case, the trustee disputes BVB's entitlement to a jury trial, submitting that BVB's right was waived by filing a claim against the estate. Granfinanciera, 492 U.S. at 58.

Local Rule 2108-1(a) requires that the bankruptcy judge shall, in any case in which a demand for a jury trial is filed, "determine whether the party has a right to a jury trial and whether the demand was properly filed."

The bankruptcy court has not determined whether BVB or Gordon are entitled to a jury trial. The alleged entitlement to a jury trial is the cornerstone of BVB's and Gordon's motions to withdraw reference. BVB and Gordon have not demonstrated "good cause" to withdraw reference.

With regard to BVB and Gordon's refusal to consent to the bankruptcy court's authority to preside over noncore claims, this likewise is not "good cause." Title 28 U.S.C. § 157(c)(1) provides that in cases without consent "[a] bankruptcy court may hear a proceeding that is not a core proceeding," subject to the requirement that

the bankruptcy court shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district court after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

28 U.S.C. § 157(c)(1). The mere existence of noncore issues, therefore, does not preclude the bankruptcy court from hearing the merits, but invokes an advisory role procedure. Cf. Cinematronics, supra (if right to jury accompanies the noncore

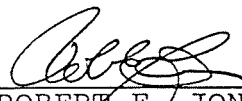
issues, then bankruptcy court cannot conduct the jury trial without consent).

Additionally, the court is concerned about Gordon's pending motion to dismiss. If the bankruptcy court grants Gordon's motion to dismiss, then Gordon's motion before this court is moot.

Conclusion

BVB's motion to withdraw reference is DENIED. Gordon's motion to withdraw reference is DENIED.

DATED this 17<sup>\*</sup> day of June, 1992.

  
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ROBERT E. JONES  
United States District Judge